HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII, Rule 32(2) (b)
Description of the Case

Criminal Appeal No. 1070 of 2001
(Old No. 401/1981)

Date of Decision : 28th March, 2006

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date 28.3.06 Initial of Judge.

Note :- Bencher Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL
Criminal Appeal No. 1070 of 2001
(Old No. 401/1981)

Mangal Singh
S/o Khem Singh
R/o Village Kimana
Patwari Circle, Tapovan,
Tehsil – Joshimath
District – Chamoli ... Appellant

Versus

State of Uttaranchal ... Respondent.

Sri R.P. Nautiyal, learned counsel for the appellant.
Sri A. Rab, Addl, G.A. and Sri Chaudhary Sudhir Kumar, learned, A.G.A. for the State.

Hon'ble J. C. S. Rawat, J.

1. This is an appeal directed against the judgment and order dated 28th January, 1981 passed by the Sessions Judge, Chamoli in Sessions Trial No. 4 of 1980, State Vs. Mangal Singh convicting the appellant u/s 328/511 I.P.C. and 315/511 I.P.C. and sentencing him two years R.I. under both the counts separately. Feeling aggrieved by the said judgment and order, the present appeal has been preferred.

2. Brief facts for the disposal of this appeal are that Smt. Kalpi Devi who was the wife of Bhup Singh had given birth to three children and thereafter the husband of Kalpi Devi, i.e., Bhup Singh got himself operated. Thereafter, Smt. Kalpi Devi developed illicit relationship with the appellant-Mangal Singh with the result she got pregnant by him. The accused-appellant attempted to administer poison to her but she did not take the entire quantity and only consumed a part thereof. Subsequently, in the afternoon of 06.09.1978, she met with the appellant in Silani Dhar Pata situate in the same village and she informed the appellant that she had not consumed the entire packed and she only took in partially. The appellant therefore attempted to push her down in a ditch

unsuccessfully with the intention to prevent the child in her womb being born alive. The said occurrence was witnessed by Raj Singh, Bharat Singh, Madan Singh, Ganpat Singh and Mahipal Singh while they were returning to their village from school. Later on the complainant, husband of Kalpi Devi was informed by his wife that she is having a child in her womb who was of the accused-appellant and she narrated the entire incident to her husband. The complainant-husband went to the patwari circle immediately and the patwari was not available in his headquarter, hence he filed the complaint before the Chief Judicial Magistrate, Gopeshwar on 09.09.1978 and the learned Magistrate order to register the case and directed to investigate the said complaint. The said complaint & order of the learned Chief Judicial Magistrate was handed over to the patwari after a lapse of about 8 days, i.e., on 17.09.1978 by the complainant himself. Thereafter, chick was prepared by the Investigating Officer and the investigation was conducted by the patti patwari and it culminated into the chargesheet.

3. The accused-appellant stands for trial before the trial court and charges were framed against accused-appellant and the charges were amended later on by the learned Sessions Judge. The appellant denied the charges and claimed the trial.

4. The prosecution, in support of his case examined Smt. Kalpi Devi as PW-1 who is the victim of the incident and she narrated the entire story as indicated above in preceding para 2 of my judgment. Madan Singh-PW2 who is the student and was coming from his school at the time of incident and he saw the incident of pushing down Kalpi Devi into ditch from a distance of one fulong. Sri Bhup Singh-PW3, who is the husband of Kalpi Devi has stated the entire incident and he lodged the complaint before the C.J.M. and thereafter handed over the said complaint to the patti patwari on

17.09.1978. The recovery of the said packet of poison was also made from possession of the complainant at his residence by the Investigating Officer on the next date. The said packet was sent to the chemical examiner for examination and it was reported that the said packet contains the zinc phosfide. The prosecution also filed the affidavit of Shri Lalita Prasad Chaudhary, Head Nazir, Collectorate, Malkhana, Gopeshwar and Sri Bachan Singh, Chaprasi of Patwari, who were formal witnesses of the case.

5. Thereafter, the accused was examined u/s 313 Cr.P.C. The accused denied all the allegations made against him and he has stated that he has been falsely implicated in the case. It was also alleged in the statement that Sister-in-law of Bhup Singh had murdered the sister-in-law of the appellant in the year j1976 and thereafter the case was terminated into the compromise. There is enmity in between the parties, hence he has been falsely implicated in this case.

6. The learned Sessions Judge after appraisal of the evidence convicted the accused-appellant as indicated above.

7. Heard learned counsel for the parties and perused the record.

8. It is to be seen as to whether the charge of attempting to administer the poison to Smt. Kalpi Devi wife of Bhup Singh with the intention that the child in her womb might not be born alive is believable or not. It is further to be seen as to whether the appellant had attempted to push Smt. Kalpi Devi down in the ditch unsuccessfully with the intention to prevent the child in her womb being born alive. Learned counsel for the appellant contended that the trial court had erred in holding that the prosecution has proved the charges against the appellant beyond reasonable doubt. It was

further contended that the evidence of Kalpi Devi did not support the prosecution version and this is a case of lack of evidence and the learned counsel for the appellant assailed the evidence of Madan Singh-PW3 and his evidence is not reliable.

9. Whereas the acceptance of puria and handing over it to Kalpi Devi-PW1 is concerned, it is merely a preparation and it is not an attempt. Mere preparation is not punishable under the provisions of I.P.C. If she would have stated before the court that she had consumed even a part of the poison that would have been an attempt to commit an offence and that attempt would have been punishable under the provisions of penal code. The evidence of Kalpi Devi-PW1 did not establish the prosecution case. It is also pertinent to mention here that this witness had not supported the prosecution version. The prosecution has not sought the permission to cross examine the witness and the witness was not cross examined by the prosecution. Her evidence did not support the prosecution instead she supported the defence. The appellant hence can rely on that evidence. It has been held in Mukhtiar Ahmed Ansari Vs. State (NCT of Delhi) reported in 2005 SCC (Cri) 1037 and Raja Ram Vs. State of Rajasthan reported in 2005 SCC (Cri) 1050.

10. The prosecution has adduced the evidence of Madan Singh-PW2 in support of his case. He has stated that he was coming from the school and he was aged about 13 years at the time when he gave the evidence before the court. He has stated that he, Rajesh Singh, Bharat Singh, Ganpat Singh and Mahitab Singh were coming on the scooter from the school. They heard the noise from the site of Silajidhar thereafter they saw that Mangal Singh-appellant was pushing Smt. Kalpi Devi towards the ditch and Kalpi Devi was making the noise. The incident was seen from the distance of one fulong.

The evidence is itself is not reliable as the witness Kalpi Devi has not stated that such incident took place. Apart this, PW-2 had seen the incident from a distance of one fulong. From one fulong, it would not be possible to recognize the faces of the persons present at the spot. Bhup Singh-PW3, the husband of Kalpi Devi-PW1 is not the witness who has seen the second occurrence. He had only stated that he handed over the packet to the patwari. It is also pertinent to mention here that PW3 filed the complaint before the C.J.M. on 09.07.1978. Though the magistrate directed to register and investigate the case on the same date, i.e., 09.07.1978. Thereafter, the complainant alongwith the order of the learned C.J.M. took it to hand over to the Patwari himself but he did not hand over it to patwari till 17.07.1978. He handed over it to Patwari on 17.07.1978 and on being asked about the delay, he informed that he was ill during that period. The explanation for the delay given to the patwari by the complainant was recorded by him in the GD. When he appeared before the court, he did not stated that he was ill during that period. The explanation had been proved before the court. It is also pertinent to mention that it was the duty of the complainant to hand over the said packet on 17.07.1978 so that matter would have been investigated properly. The said packet would have been given at the time of filing of the complaint before the learned C.J.M. He did not hand over the said packet to the learned C.J.M. or patwari and he had not given any reason as to why the said packet was not given to the learned C.J.M. at the time of filing the complaint or patwari immediately. As a matter of fact he should have handed over this packet to the learned C.J.M. at the time of filing of the complaint so that it could not be said that there might be any manipulation in the contents of the packet. Sri Bhup Singh-PW3 had not given any cogent reason as to why the said packet was not handed over to the learned C.J.M. or the patwari at the time of lodging of the complaint & report respectively. This packet remains with the complaint for a

pretty long time and it was ruled out that the said packet was manipulated by the complainant. It is also pertinent to mention here that the prosecution has not adduced the other witnesses, Raj Singh, Bharat Singh, Ganpat Singh and Mahitab Singh. They were the witnesses of the second incident and the testimony of Kalpi Devi and Madan Singh has been held unreliable. Hence it was obligatory on the part of the prosecution to adduce the evidence of the other witnesses. In absence of the credible and cogent evidence of the prosecution, non examination of the other independent witness leads me to take adverse inference against the prosecution. The prosecution adduced the evidence in support to above version. Smt. Kalpi Devi who is the star witness of this case had stated the entire incident as indicated in para 2 of my judgment but she had made variation in two places in her statements. At the first place she had stated that a packet was given to her and that packed was opened by her but she did not consume it whereas in the complaint it is alleged that she had consumed it partially. With regard to the later part of the incident she had not supported the prosecution and she has stated that the appellant asked as to whether she consumed the said packet, she has stated that she had not consumed it. Smt. Kalpi Devi had also denied the facts that she was pushed down to ditch. In later part of the incident she had not supported the version of the prosecution.

11. I am of the view that the learned Sessions Judge had erred in holding the appellant guilty u/s 328/511 I.P.C. and 315/511 I.P.C. The prosecution evidence does not inspire confidence. The prosecution had not proved the case against the appellant.

12. The appeal is allowed. The conviction and sentence awarded against the appellant by the trial court per judgment and order dated 28.01.1981 are set aside. The appellant Mangal Singh is acquitted for

the charge levelled against him under section 328/511 I.P.C. and 315/511 I.P.C. The appellant is on bail. He need not surrender before the court below to serve the sentence. His bail bonds are cancelled and sureties are discharged.

13. Let the record along with a copy of this judgment be sent back to the trial court immediately for necessary action and compliance and the compliance report to be submitted within four months.

(J.C.S. RAWAT, J.)

28th March, 2006
Shiv